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Filing date: **01/29/2008**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91176133
Party	Defendant Swat Mosquito Systems, LLC
Correspondence Address	Kevin P. Crosby Brinkley, Morgan et al. 200 E. Las Olas Blvd., Suite 1900 Fort Lauderdale, FL 33301 UNITED STATES chris.mendez@brinkleymorgan.com
Submission	Other Motions/Papers
Filer's Name	Stacy Schwartz
Filer's e-mail	stacy.schwartz@brinkleymorgan.com,silvia.inman@brinkleymorgan.com
Signature	/SMS/
Date	01/29/2008
Attachments	Motion for Judgment.pdf (4 pages)(109917 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Application Serial No. 78/860580

Filed On: April 13, 2006

For the Mark: SWAT MOSQUITO SYSTEMS

Published in the *Official Gazette* on: November 14, 2006

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NCH Corporation,	:	
	:	
Opposer,	:	
	:	Opposition No. 91176133
v.	:	
	:	Applicant's Motion for Judgment for
	:	Plaintiff's Failure to Prove Case
Swat Mosquito Systems, LLC,	:	
	:	
Applicant.	:	
-----X	:	

Applicant, Swat Mosquito Systems, LLC ("Applicant"), in the above-identified opposition proceeding, by and through its respective attorneys, hereby moves for entry of judgment against Opposer, pursuant to 37 C.F.R. §2.132(a) and TBMP § 534. Dismissal and entry of judgment against Opposer is proper because Opposer's time for taking testimony has expired and Opposer has not taken testimony or offered any evidence during the course of this proceeding. Thus, Applicant is entitled to have this proceeding dismissed for Opposer's failure to prosecute this proceeding.

Summary of Pending Opposition

1. More than ten (10) months ago, Opposer, NCH Corporation ("Opposer" or "NCH"), filed a Statement of Opposition consisting of the following two sentences:

CHECKMARK, a division of DM Resources, Inc. (a subsidiary of NCH Corporation) is the owner of the trademark "SWAT" that has been used extensively as an insect repellant throughout the United States since at least 1974. Use of this trademark by others will infringe upon the trademark rights of CHECKMARK, and will likely cause confusion.

2. Opposer does not allege ownership of a trademark registration. Moreover, it is alleged that a related entity to the Opposer (and *not* the Opposer, NCH) owns the mark "SWAT." Thus, is it

not even clear from the Statement of Opposition whether NCH is the proper party to have initiated this opposition or has any standing to maintain this opposition. *See* Applicant's Fifth Affirmative Defense. Applicant has denied all allegations contained in the Statement of Opposition.

Procedural History

3. On December 14, 2006, Opposer filed its First Request for an Extension of Time to Oppose the application at issue herein. Opposer was granted a thirty (30) day extension of time to file a Notice of Opposition. Thereafter, on January 11, 2007, Opposer requested, and obtained from the Board, a sixty (60) day extension of time to File a Notice of Opposition.

4. On March 12, 2007, the Statement of Opposition referenced above was filed.

5. The parties agreed to extend the initial deadlines and trial dates set by the Board and, on May 3, 2007, the Board granted the parties' requested extension of the deadlines.

6. On May 23, 2007, Applicant timely filed its Answer and Affirmative Defenses.

7. The discovery period opened on May 1, 2007 and closed on October 29, 2007. Opposer's testimony period opened on December 31, 2007 and closed on January 28, 2008. Opposer has taken no testimony and offered no evidence to support a basis for opposing Applicant's mark. As of this date, Opposer has not requested additional time to conduct discovery or take testimony.

Argument

8. Trademark Rule 2.132(a) provides in pertinent part:

(a) If the time for taking testimony by any party in the position of plaintiff has expired and that party has not taken testimony or offered any other evidence, any party in the position of defendant may, without waiving the right to offer evidence in the event the motion is denied, move for dismissal on the ground of the failure of the plaintiff to prosecute...In the absence of a showing of good and sufficient cause, judgment may be rendered against the party in the position of plaintiff.

It has been almost one year since Opposer filed its two sentence Statement of Opposition and to date, Opposer has taken no action whatsoever to establish a plausible basis for opposing Applicant's mark. These circumstances warrant judgment against Opposer with prejudice. *See Hewlett-Packard Co. v. Olympus Corp.*, 931 F.2d 1551 (C.A. Fed. 1991).


9. Applicant worked diligently to resolve another opposition proceeding (No. 91177244) initiated by another party in connection with the application at issue herein and was able to reach a resolution in that proceeding by its agreement to amend its description of goods and services. Entry of Applicant's proposed amendment in that proceeding, however, has been suspended pending the outcome of this proceeding, which Opposer herein clearly has failed to prosecute. Applicant made several attempts to try and resolve this proceeding with Opposer, to no avail. Opposer has had plenty of time to either attempt to resolve this matter or prosecute its claim by presenting evidence to support a proper basis against Applicant to oppose the instant mark. The Board is justified in enforcing its procedural deadlines by entering judgment against Opposer. *See Hewlett-Packard Co.*, 931 F.2d at 1554.

Wherefore, Applicant, Swat Mosquito Systems, LLC, requests that the Board enter judgment against Opposer, NCH Corporation with prejudice.

Respectfully submitted,

SWAT MOSQUITO SYSTEMS, LLC

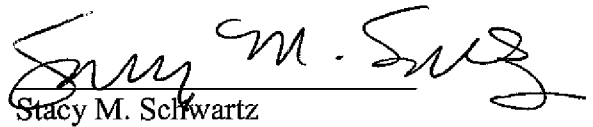
Dated: January 29th, 2008

By: 
Kevin P. Crosby, Bar No. 654360, Reg. No. 32,123
Stacy M. Schwartz, Bar No. 0520411
Brinkley Morgan Solomon Tatum, Stanley, Lunny &
Crosby LLP
200 East Las Olas Blvd, Suite 1900
Fort Lauderdale, FL 33301
Telephone: 954-522-2200
Facsimile: 954-522-9123

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MOTION FOR JUDGMENT FOR PLAINTIFFS FAILURE TO PROVE CASE is being deposited with the United States Postal Service as first class mail, postage prepaid, to counsel for Opposer on this 29th day of January, 2008 as follows:

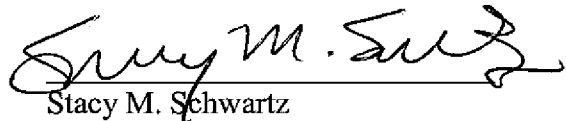
Bonnie Bowes Reinke
NCH Corporation
2424 Chemsearch Blvd
Irving, TX 75062


Stacy M. Schwartz

CERTIFICATE OF FILING

I hereby certify that this correspondence is being electronically filed with the Trademark Trial and Appeal Board using the ESTTA Electronic Filing System on January 29, 2008.

Date: January 29, 2008


Stacy M. Schwartz